Petition

81-1383

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No. ———

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

HASKON, INC., a Delaware corporation, and HERCULES INCORPORATED, a Delaware corporation,
Petitioners,

vs.

LeSUEUR CREAMERY, INCORPORATED, a Minnesota corporation,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether federal diversity jurisdiction may be extended to create a cause of action in negligence for economic loss arising out of a commercial transaction, where state law expressly bars tort theories of recovery so as not to circumvent the statutory scheme of the Uniform Commercial Code.

2. Whether the federal courts may deprive civil litigants of their Seventh Amendment right to trial by jury on a disputed issue of fact, where resolution of that issue governs the availability of a cause of action under state law.

LIST OF ALL PARTIES

All parties to this proceeding appear in the caption of the case in this Court.

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

CITATIONS TO OPINIONS BELOW

The official report of the United States Court of Appeals opinion appears as *LeSueur Creamery, Inc. v. Haskon, Inc.*, 660 F.2d 342 (8th Cir. 1981). The United States District Court for the District of Minnesota issued a memorandum and order, which have not been reported, in response to the motions of Haskon, Inc. and Hercules Incorporated for judgment notwithstanding the verdict or, in the alternative, for a new trial and for an amended judgment. Said memorandum and order, as well as the Court of Appeals Opinion, are reproduced in the Appendix hereto.

STATEMENT OF JURISDICTIONAL GROUNDS

The judgment of the Court of Appeals for the Eighth Circuit was entered on September 17, 1981. A timely petition for rehearing *en banc* was denied on October 26, 1981, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254.

STATUTORY PROVISIONS INVOLVED

Minnesota Statutes § 336.1-102(1) & (2) (1980) (Uniform Commercial Code):

(1) This chapter shall be liberally construed and applied to promote its underlying purposes and policies.

(2) Underlying purposes and policies of this chapter are

(a) to simplify, clarify, and modernize the law governing commercial transactions;

(b) to permit the continued expansion of commercial practices through custom, usage, and agreement of the parties;

(c) to make uniform the law among the various jurisdictions.

Minnesota Statutes § 645.22 (1980):

Laws uniform with those of other states shall be interpreted and construed to effect their general purpose to make uniform the laws of those states which enact them.

STATEMENT OF THE CASE

Plaintiff LeSueur Creamery, Incorporated (Respondent herein) brought this commercial action to recover profits allegedly lost because of a used DeLaval milk pasteurizer purchased by LeSueur through defendant Haskon, Inc. (one of the Petitioners herein), a dairy supply distributor. Jurisdiction in the United States District Court for the District of Minnesota was based on diversity of citizenship, 28 U.S.C. § 1332 (a)(1). In its Complaint, LeSueur alleged that the subject pasteurizer "was defective and did not operate properly from the day it was sold" (Complaint, ¶XXXI) and that Haskon's employee's had violated "a duty as a seller of said pasteurizers to exercise reasonable care in manufacturing and designing said equipment" (Complaint, ¶XXX).

The United States Court of Appeals for the Eighth Circuit affirmed judgment against Haskon only on grounds of negligence. Then, fifteen days later, while the petition for rehearing was pending before the Court of Appeals, the Minnesota Supreme Court expressly decided that no cause of action is available in negligence for economic losses arising out of commercial transactions. *Superwood Corp. v. Siempelkamp Corp.*, 311 N.W.2d 159 (Minn. 1981). Although Haskon furnished the Minnesota decision to the Court of Appeals, the petition for rehearing was denied without explanation.

The used pasteurizer and related equipment were sold by Haskon for $5,000.00, and were delivered and installed at LeSueur's cheese-making creamery in LeSueur, Minnesota during October, 1969 (Def. Trial Exs. 1 and 2; Pl. Trial Ex. 34) (T. 7-8).[1] LeSueur utilized the pas-

[1]Citations designated as "T" are page numbers from the transcript before the United States District Court for the District of Minnesota.

teurizer in its cheddar cheese operations for heating milk. (T. 12-13, 30-31, 35, 302, 353). In 1971, LeSueur asked Haskon to restream the pasteurizer to a greater capacity (by adding more plates to expand the heating and cooling surface areas) (T. 21, 104).

Although LeSueur's negligence claim was based, in the Complaint, upon Haskon's "manufacturing and designing" of the used pasteurizer, that theory was abandoned at the time of trial.[2] Instead, LeSueur began focusing on the services which Haskon had provided, and asserted a different type of negligence claim: that Haskon was unable to correct problems in the operation of the used pasteurizer, that another dealer was supposedly able to, and therefore that Haskon must have been negligent.

At trial, LeSueur claimed no damages for the maintenance problems with the pastuerizer, but instead stipulated that its only damages were lost yield in its cheddar cheese production (T. 736-37), measured by the lost profits which it claimed it could have received if it had obtained a higher yield of cheese from the milk which it processed through the pasteurizer (T. 72, 555-56). LeSueur sought damages for all the milk which it daily processed through the used pasteurizer from 1971 through August, 1974, when problems in the pasteurizer were allegedly corrected by another distributor.

Haskon denied LeSueur's allegations on the grounds that: (a) all warranties had been clearly and conspicuously disclaimed by the parties; (b) LeSueur's warranty claims were time barred by the four-year statute of limi-

[2]Petitioner Haskon, Inc. is a distributor of dairy equipment and neither designs nor manufactures any equipment. Petitioner Hercules Incorporated is Haskon's parent corporation and is not otherwise involved in the dairy equipment business.

tations; (c) the parties' sale documents limited the seller's liability to the $5,000.00 purchase price; and (d) purely commercial losses are not recoverable under a negligence theory.

LeSueur presented its defect claim primarily through the testimony of Professor Howard Morris of the University of Minnesota. Professor Morris testified, first, that excessive heat treatment of milk over an excessive period of time can denature certain proteins in milk and result in a reduced cheese yield (T. 355, 358). He also admitted, however, that excessive heat for a shorter period of time may *increase* the yield (T. 359, 412-415). Professor Morris had no engineering training or experience and had performed no tests or measurements on the subject pasteurizer to determine if in fact milk had been held at an excessive temperature for an excessive period of time (T. 368-70, 398, 408).

At the close of LeSueur's case and again at the close of all the evidence, Haskon moved for a directed verdict on negligence, but the motions were denied (T. 589, 692-95). Haskon then requested that the jury be instructed that it could not find negligence unless the jury found physical damage to property:

> *Haskon's Requested Jury Instruction No. 27:*
>
> You are instructed that the plaintiff may not recover purely economic losses under a theory of negligence. Whereas a person may recover for personal injuries or property damage from another person who has been negligent, where there is no accident and no physical damage, and where the only loss is an economic one, such losses are not recoverable by reason of mere negligence.

Haskon's Requested Special Verdict Interrogatories Nos. 14 and 15:

14. Were defendants negligent with respect to the goods and/or services about which plaintiff complains in this lawsuit?

Answer: ——— (Yes or No).

15. If your answer to question No. 14 is "Yes," then answer this question: was defendants' negligence a direct cause of physical damage to plaintiff's property?

Answer: ——— (Yes or No).

The trial judge rejected that requested instruction and special verdict questions on LeSueur's argument that LeSueur had a negligence cause of action regardless of property damage.

The trial court also denied defendants' motions for judgment notwithstanding the verdict or a new trial. On appeal, the United States Court of Appeals for the Eighth Circuit affirmed the judgment only on negligence grounds and reduced the jury's $605,250.00 damage award—to $453,937.50—reflecting the amount of LeSueur's loss attributable to its own 25% causal negligence, less the $16,016.58 uncontested counterclaim.

The Court of Appeals rejected Haskon's argument that LeSueur had no cause of action in negligence under Minnesota law for solely economic loss. Although recognizing that "[t]he majority of courts to consider the issue . . . have held that claims for purely economic losses cannot be premised on tort theories" (660 F.2d at 349, fn.10), the Court of Appeals erroneously predicted that the Minnesota Supreme Court would have sustained the negligence count:

> The Minnesota Supreme Court has not yet specifically addressed the issue of whether economic loss unaccompanied by personal injury or property damage can be recovered in a negligence action. The court recently suggested in dicta that it may permit los[t] profits to be recovered in tort even in the absence of personal injury or property damage. 660 F.2d at 349.

The Court of Appeals also justified its affirmance of the negligence count on its factual finding, made for the first time at the appellate court level, that LeSueur's claim "is not based solely on lost profits." *Id.* Despite conflicting evidence in the record, the Court of Appeals found that possible molecular changes in the milk amounted to property damage:

> LeSueur also suffered property damage to its milk. The excessive heat denatured the whey proteins in the milk and reduced the solubility of the ionic calcium in the milk and this damage decreased LeSueur's cheese yield. *Id.*

REASONS FOR GRANTING THE WRIT

1. The Court of Appeals Decision Conflicts With the On-Point Decision of the Minnesota Supreme Court as to Whether a Cause of Action May Be Asserted in Negligence for Commercial Loss.

The judgment of the Court of Appeals was entered on September 17, 1981. On October 2, 1981, while Haskon's petition for rehearing was still pending, the Minnesota Supreme Court decided the very issue of state law which had been the subject of speculation by the Court

of Appeals. Contrary to the federal court's prediction about state law, the Minnesota Supreme Court squarely held that the Uniform Commercial Code alone governs the rights and remedies of parties to commercial transactions. *Superwood Corp. v. Siempelkamp Corp.*, 311 N.W. 2d 159 (Minn. 1981) (reproduced in the Appendix hereto).

There, plaintiff Superwood had purchased commercial equipment which apparently malfunctioned. Superwood commenced a lawsuit in federal district court against the plate press manufacturer, claiming breach of contract, breach of warranty, negligence and strict liability.[3] As the result of the equipment failure, Superwood had sustained loss of profits, clean-up costs, repair and replacement costs, and increased costs for production in other facilities. The federal district court dismissed the contract and warranty claims on limitations grounds, and certified the negligence and strict liability theories to the Minnesota Supreme Court as uncertain areas of Minnesota law. The Minnesota Court held that a commercial user of equipment damaged in its property and business did not have a tort action because of Minnesota public policy as expressed by the legislature in its enactment of the Uniform Commercial Code (U.C.C.):

> The U C.C. clarifies the rights and remedies of parties to commercial transactions. For example, there are specific provisions covering warranties, *see* Minn. Stat. § 336.2-314 (1980); warranty disclaimers, *see* Minn. Stat. § 336.2-316 (1980); liability limita-

[3]Like plaintiff *Superwood*, LeSueur had alleged (as a fourth claim in its Complaint) strict tort liability. Prior to trial, however, the District Court dismissed that count for failure to state a claim since LeSueur was seeking economic loss from a commercial transaction.

> tions, *see* Minn. Stat. § 336.2-719 (1980); and notice provisions, *see* Minn. Stat. § 336.2-607 (1980). The recognition of tort actions in the instant case would create a theory of redress not envisioned by the legislature when it enacted the U.C.C. Furthermore, tort theories of recovery would be totally unrestrained by legislative liability limitations, warranty disclaimers and notice provisions. *To allow tort liability in commercial transactions would totally emasculate these provisions of the U.C.C. Clearly, the legislature did not intend for tort law to circumvent the statutory scheme of the U.C.C.* 311 N.W.2d at 162 (emphasis added).

Without the benefit of the *Superwood* decision, the Court of Appeals affirmed judgment against Haskon, for approximately a half million dollars, on a cause of action which undoubtedly was barred under Minnesota law. Although Haskon sought a rehearing in light of the *Superwood* decision, the Court of Appeals, without explanation, refused to reconsider.

Petitioners respectfully request that a writ of certiorari be issued in order to bring the Court of Appeals' decision in this diversity action into compliance with the public policy of Minnesota as unequivocably expressed by the Minnesota Supreme Court. Alternatively, petitioners request that a writ be issued for the purpose of remanding this action to the Court of Appeals for reconsideration on rehearing consistent with the Minnesota Court's decision.

The transactions between LeSueur and Haskon, with respect to the $5,000.00 used pasteurizer, were commercial in nature and accompanied by written contracts signed by both parties. LeSueur, a commercial dairy,

claimed damages only for lost profits from decreased cheese yield. During the period of more than three years when the pasteurizer allegedly malfunctioned, LeSueur processed millions of pounds of milk through the equipment each month, and calculated its lost yield by comparing expected cheese/milk percentages with its actual cheese/milk percentages.

LeSueur did not contend that its milk was damaged such that it became unsafe, unfit, or otherwise unusable because of the pasteurizer. LeSueur simply claimed that the pasteurizer caused it to have a reduced yield of cheese from its milk—a classic claim for commercial breach of contract or warranty for expectation damages. LeSueur's continued operation of the $5,000.00 pasteurizer, day after day for more than three years, is simply inconsistent with a tort theory that the pasteurizer was causing property damage to LeSueur's milk.

Not only does the Court of Appeals opinion conflict with Minnesota law, but it is also inconsistent with the overwhelming majority of jurisdictions which have emphasized that the Uniform Commercial Code, not tort law, provides the remedy for commercial losses. *See, e.g., Jones & Laughlin Steel Corp. v. Johns-Manville Sales Corp.*, 626 F.2d 280 (3d Cir. 1980); *S. M. Wilson & Co. v. Smith International, Inc.*, 587 F.2d 1363, 1376 (9th Cir. 1978); *Hales v. Green Colonial, Inc.*, 490 F.2d 1015, 1021-22 (8th Cir. 1974) (dictum); *Bright v. Goodyear Tire & Rubber Co.*, 463 F.2d 240 (9th Cir. 1972); *Argo Welded Products, Inc. v. J. T. Ryerson Steel & Sons, Inc.*, Nos. 79-4710 and 80-4107 (E.D. Pa. 1981); *Miehle Co. v. Smith-Brooks Printing Co.*, 303 F. Supp. 501, 502 (D. Colo. 1969); *Arizona v. Cook Paint & Varnish Co.*,

391 F. Supp. 962 (D. Ariz. 1975), *aff'd.* 541 F.2d 226 (9th Cir. 1976), *cert. denied,* 430 U.S. 915 (1977); *Karl's Shoe Stores, Ltd. v. United Shoe Machinery Corp.,* 145 F. Supp. 376, 377-78 (D. Mass. 1956); *Donovan Construction Co. v. General Electric Co.,* 133 F. Supp. 870, 873 (D. Minn. 1955); *McGhee v. GMC Truck & Coach Div.,* 98 Mich. App. 495, 296 N.W.2d 286, 291 (1980); *Marcil v. John Deere Industrial Equipment Co.,* 403 N.E.2d 430 (Mass. App. 1980); *Clark v. International Harvester Co.,* 99 Idaho 326, 581 P.2d 784, 790-94 (1978); *Alfred N. Koplin & Co. v. Chrysler Corp.,* 49 Ill. App. 3d 194, 364 N.E.2d 100 (1977); *Morrow v. New Moon Homes, Inc.,* 548 P.2d 279, 282 (Alas. 1976); *Long v. Jim Letts Oldsmobile, Inc.,* 135 Ga. App. 293, 217 S.E.2d 602 (1975); *Hawkins Construction Co. v. Matthews Co.,* 190 Neb. 546, 209 N.W. 2d 643, 648 (1973); *Anthony v. Kelsey-Hayes Co.,* 25 Cal. App. 3d 442, 102 Cal. Rptr. 113 (1972); *Rhodes Pharmacal Co. v. Continental Can Co.,* 72 Ill App.2d 362, 219 N.E.2d 726, 729 (1966); *Seely v. White Motor Co.,* 63 Cal. 2d 9, 403 P.2d 145, 45 Cal. Rptr. 17 (1965).

One of the leading decisions on this issue is *Jones & Laughlin Steel Corp. v. Johns-Manville Sales Corp.,* 626 F.2d 280, 282 (3d Cir. 1980). That case allegedly included water damage to steel products under construction under a defective roof, but the Third Circuit concluded that tort theories were precluded because the action was commercial in nature. Similarly, in *S. M. Wilson & Co. v. Smith International, Inc.,* 587 F.2d 1363, 1368 (9th Cir. 1978), the obvious damage to the replacement blades for the tunnel-boring equipment did not remove that action from the comprehensive statutory scheme of the U.C.C.:

> Where the suit is between a non-performing seller and an aggrieved buyer and the injury consists of damage to the goods themselves and the cost of repair of such damage or a loss of profits that the deal had been expected to yield to the buyer, it would be sensible to limit the buyer's rights to those provided by the Uniform Commercial Code. To treat such a breach as an accident is to confuse disappointment with disaster. *Id.*

2. The Court of Appeals Decision Raises Significant and Recurring Problems Concerning Uniformity and Predictability in the Application of Commercial Law Under the Uniform Commercial Code.

Minnesota, like the other states which have adopted the U.C.C., clearly intended to simplify the law governing commercial transactions and assure uniformity of decisions throughout the United States. Minn. Stat. §§ 336.-1-102(1) & (2) and 645.22 (1980). Since business transactions often cross state lines, predictability of the commercial law is essential.

The Court of Appeals decision, if permitted to stand, will lead inevitably to complexity and uncertainty in commercial transactions, contrary to the policy of the U.C.C. If molecular analyses of property damage can be utilized to create a cause of action in tort, then the statutory framework of the U.C.C. will be rendered meaningless.

Such problems of interpretation are likely to arise in almost every commercial dispute. Plaintiffs will have substantial incentive to emphasize claims under tort theories, particularly where, as in *Superwood*, they are barred from recovery under the Uniform Commercial Code due to the

statute of limitations, lack of notice, or disclaimers in the sales agreements. Few factual settings could be envisioned in which a plaintiff who has experienced difficulties with commercial equipment would be unable to show *some* sort of fortuitous, minimal or molecular property damage.

The *Superwood* decision made it clear, in Minnesota, that such collateral evidence would not sustain recovery under a negligence theory. In *Superwood,* when the cylinder on the hot plate press failed, the plaintiff did suffer damage to hydraulic fluid and other property as evidenced by its claim for clean-up labor costs. Those damages were commercial losses, however, and could not be used to circumvent the Uniform Commercial Code. Similarly, in LeSueur's case, the purpose of purchasing the used pasteurizer was to produce cheese for commercial sale. Any impact on the molecules in the raw material (milk) processed in the pasteurizer affected only LeSueur's profit or loss in its business. Since Uniform Commercial Code remedies apparently were barred by the elapsed statute of limitations and limited by the parties' signed sale agreements, LeSueur attempted to assert a negligence claim.

The Court of Appeals opinion, in its focus on molecular property damage, sets a disturbing precedent for future interpretation of the Uniform Commercial Code. In addition, it illustrates the complexity and uncertainty which will be introduced into commercial litigation when a negligence claim can be based upon property damage other than the sudden, material, physical damage which traditionally has provided the basis for common law tort actions.

3. The Court of Appeals *Sua Sponte* Factual Finding on the Issue of Property Damage Exceeds the Limits of Appellate Review and Infringes Upon Petitioners' Seventh Amendment Right to a Trial By Jury.

At trial, Haskon expressly requested that the jury resolve the factual issue of property damage and that the jury be instructed to find no cause of action for negligence unless property damage had occurred. The trial court rejected those requests. Neither the jury, nor the trial court, made any specific findings of property damage.

The Court of Appeals had no authority to make the factual finding that "LeSueur also suffered property damage to its milk." 660 F.2d at 349. Its conclusion that the ultimate result of excessively heating milk is the reduction of cheese yield, (*id.*, fn. 11), is inconsistent with LeSueur's evidence at trial and is not necessarily the finding that the jury would have made had it been properly instructed and asked to resolve that issue. According to the testimony of LeSueur's expert in cheese production, excessive heat, at least in laboratory tests, sometimes results in *greater* production of cheese from the same quantity of milk, which hardly could be called property damage (T. 359, 412-15). He further testified that the time period in which milk was held at an increased temperature within LeSueur's equipment was less than the time which would necessarily result in a decreased, as opposed to increased, yield.[4] (*See* T. 414-15.)

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[4]As noted by the Court of Appeals, LeSueur also contended that the pasteurizer at times caused the milk to enter the vats at too *low* a temperature and that this underheating reduced yield. 660 F.2d at 346. No one contended that underheating would cause a molecular change in milk.

That the jury awarded damages to LeSueur does not mean that it necessarily would have found damage to property. The damage instruction given to the jury was a warranty-law instruction for expectation damages. The jury was instructed as follows:

> In this action the plaintiff claims consequential damages in the form of lost profits. A buyer may recover lost profits as consequential damages if such profits (a) are proved to be a reasonable certainty, and (b) could not reasonably have been prevented by the plaintiff. A buyer may not recover lost profits if the amount of such losses is merely speculative. (T. 862.)

The jury's damage determination presumably would have been exactly the same whether or not it found property damage to the milk.

Issues of fact in jury cases should be resolved by the juries and not by trial judges or other courts. *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 468 (1962). Haskon did everything courtroom decorum permitted to get a jury resolution on that issue. Haskon had a Seventh Amendment right to trial by jury on that disputed factual question, and should not have been deprived of its right by the Court of Appeals.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Eighth Circuit Court of Appeals or, alternatively, for the purpose of remanding this action for rehearing by the Court of Appeals in light of the decision in *Superwood Corp. v. Siempelkamp Corp.*, 311 N.W.2d 159 (Minn. 1981).

Respectfully submitted,

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Dated: January 22, 1982.

Appendix

APPENDIX

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
SECOND DIVISION

LeSueur Creamery, Incorporated, a Minnesota corporation,

Plaintiff,

vs.

Haskon, Inc., a Delaware corporation; Hercules, Incorporated, a Delaware corporation,

Defendants.

Memorandum and Order

Civil 2-75-123

This matter comes before the Court pursuant to defendants' motion for judgment notwithstanding the verdict or, in the alternative, for a new trial and for an amended judgment. Judgment in the sum of $605,250 in favor of plaintiff was entered against Haskon, Inc., Hercules, Incorporated, and Hercules Powder Co., on July 30, 1980. On August 1, 1980, an amended judgment in the sum of $605,250 in favor of plaintiff was entered against only Haskon, Inc. and Hercules, Incorporated.

In their motion for judgment notwithstanding the verdict, defendants raise arguments ranging from a challenge to the special verdict form to specific attacks on plaintiff's alleged grounds of recovery and the admissibility of plaintiff's tax returns. This Court has faced and ruled on most, if not all, of these issues during the course

of this action. After further consideration of defendants' arguments, the Court remains unpersuaded that either a judgment notwithstanding the verdict should be entered or that a new trial should be granted.

In their motion for an amended judgment, defendants also assert three other claims for relief: (1) A directed verdict on their counterclaim should be entered; (2) Hercules Powder Company and Hercules Incorporated should be dismissed from this action; and (3) the judgment should be reduced because of plaintiff's comparative fault.

During the course of trial, this Court directed a verdict in favor of Haskon, Inc.. and Hercules, Incorporated on their counterclaim in the amount of $16,016.58, together with interest at the rate of 6% per annum from October 31, 1974, to December 31, 1979 ($4,965.55), and at 8% per annum from January 1, 1980, to July 30, 1980 ($744.22), for a total of $21,726.35. Plaintiff does not dispute this award or its amount and does not oppose its inclusion and entry as part of the judgment.

This Court, on July 25, 1980, ordered Hercules Powder Company dismissed from this action. Plaintiff does not dispute the Court's order of dismissal and the amended judgment entered on August 1, 1980, correctly reflects that order.

As regards defendants' motion to dismiss and discharge Hercules, Incorporated from any judgment in favor of plaintiff, defendants assert that the only evidence of involvement by Hercules, Incorporated is its relationship with Haskon, Inc., a wholly-owned subsidiary of Hercules, Incorporated. Defendants further assert that there is no evidence that Haskon, Inc. was improperly incorporated or was not operated as an entirely separate legal entity.

Plaintiff argues against dismissal of Hercules, Incorporated on two grounds. First, that the testimony of Edward J. Donohue establishes that Haskon, Inc. and Hercules, Incorporated were operated as a single entity. Donohue testified that when he returned to work in January 1974 for Haskon, Inc., he was paid by and considered himself an employee of Hercules, Incorporated. Second, plaintiff objects to the late raising of this issue and contends that the delay has prejudiced it since it had no notice and thus did not prepare evidence regarding the issue.

This matter was initially raised by defendants in chambers on July 29, 1980, on defendants' motion for a directed verdict. At that time, defendants asserted that a factual issue existed as to whether Hercules, Incorporated had such absolute control over Haskon, Inc. that the separate legal distinction between the two should be pierced. Plaintiffs, in turn, contended that the uncontroverted evidence in the record showed the two entities were operated as one and should be jointly responsible. Plaintiffs moved that the Court find as a matter of law that Hercules, Incorporated was jointly responsible for the actions of Haskon, Inc. This Court took plaintiff's motion under advisement.

In light of the uncontroverted evidence presented at trial, this Court finds, as a matter of law, that Haskon, Inc. and Hercules, Incorporated are so closely related in their operation, if not in their form, that Hercules, Incorporated should be held jointly liable for the actions of Haskon, Inc. *See DeBry v. Transamerica Corp.*, 601 F.2d 480, 490-92 (10th Cir. 1979); *Japan Petroleum Co. (Nigeria) Ltd. v. Ashland Oil*, 456 F.Supp. 831, 838-46 (D. Del. 1978).

Lastly, defendants contend the judgment should be amended inasmuch as the jury found that twenty-five percent of the negligence that caused plaintiff damage was attributable to plaintiff. This finding of comparative fault, defendants assert, requires a reduction of the damage figure for which defendants are liable, whether their liability is attributable to or resulting from their negligence, breach of warranty, or misrepresentation. Minn. Stat. §604.01 (Supp. 1979).

Plaintiff agrees that under the negligence count the verdict would have to be reduced by the twenty-five percent comparative negligence finding. It argues, however, that under the warranty or misrepresentation counts the verdict would not have to be reduced since the comparative fault statute does not apply. Although plaintiff agrees with defendants' argument that the statute would likely be interpreted by the Minnesota Supreme Court to apply to warranty claims, plaintiff argues application of the statute would not be proper for two reasons. First, the jury has already reduced the total damages claimed by the twenty-five percent comparative fault finding. Plaintiff sought to prove the value of the loss of yield to be $807,000, which if reduced by twenty-five percent equals the jury verdict of $605,250. Second, the plaintiff asserts that the Court's mitigation of damage instruction allowed the jury to reduce the damage award to reflect plaintiff's alleged failure to mitigate, which plaintiff contends is the same as fault under the comparative fault statute. A reduction of the verdict for comparative fault after the jury has had the opportunity to reduce it for failure to mitigate, plaintiff argues, would allow a double reduction for plaintiff's single act.

Assuming, without deciding, the parties' interpretation

of the comparative fault statute to be correct, this Court finds persuasive the argument that the jury has already reduced the verdict to reflect plaintiff's negligence or failure to mitigate. A further reduction is neither proper nor required by the comparative fault statute.

Based on the briefs and arguments of counsel, all the files and records herein, and the foregoing,

IT IS ORDERED that:

1. Defendants' motion for a judgment notwithstanding the verdict or, in the alternative, a new trial is denied;

2. The judgment entered in favor of plaintiff on July 30, 1980, and amended on August 1, 1980, is hereby vacated and the order entered on August 1, 1980 is amended to read as follows:

"IT IS ORDERED AND ADJUDGED that Plaintiff do have and recover of and from the Defendants the sum of Five Hundred Eighty-Three Thousand Five Hundred Twenty-Three and 65/100 Dollars ($583,523.65), which represents the jury verdict of Six Hundred Five Thousand Two Hundred Fifty and no/100 Dollars ($605.250.00), reduced by the directed verdict for defendants on their counterclaim of Sixteen Thousand Sixteen and 58/100 Dollars ($16,016.58), plus interest of Five Thousand Seven Hundred Nine and 77/100 Dollars ($5,709.77).";

3. The judgment hereby entered does not run against the Hercules Powder Company, which was earlier dismissed from this action.

Dated: September 26, 1980.

/s/ ROBERT G. RENNER
United States District Judge

LeSUEUR CREAMERY, INC., a Minnesota Corporation,
Appellee,

vs.

HASKON, INC., a Delaware Corporation; HERCULES, INC., a Delaware Corporation,
Appellants.

No. 80-2003

United States Court of Appeals,
Eighth Circuit.
Submitted June 17, 1981.
Decided Sept. 17, 1981.

Before HEANEY and HENLEY, Circuit Judges, and NICHOL,* Senior District Judge.

HEANEY, Circuit Judge.

LeSueur Creamery, Inc., commenced an action against Haskon, Inc., and Hercules, Inc.,[1] alleging breach of warranty, negligence and misrepresentation with respect to the sale, installation and servicing of pasteurizing equipment. The action was tried to a jury and special interrogatories were submitted by the district court on each of the three theories but with a single damages question.

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*The Honorable Fred J. Nichol, United States Senior District Judge for the District of South Dakota, sitting by designation.

[1]Haskon is a wholly-owned subsidiary of Hercules. The trial court found, as a matter of law, that Haskon and Hercules, Inc., "are so closely related in their operation, if not their form, that Hercules, Incorporated should be held jointly liable for the actions of Haskon, Inc." Haskon and Hercules do not appeal from this finding.

The jury found in favor of LeSueur on each cause of action and awarded it $605,250. It also found that LeSueur was contributorily negligent and twenty-five percent of LeSueur's damages were caused by that negligence. The district court entered judgment in favor of LeSueur for $583,523.65, the amount of the jury verdict less $16,016.58 awarded to Haskon on a counterclaim. Haskon appeals, contending that the award cannot be sustained on any theory, and that if the award can be sustained, the trial court erred in not reducing it by twenty-five percent. While the issues are not free from doubt, we affirm the award on a theory of negligence and reduce it by twenty-five percent to $437,920.92.[2]

I. *Facts.*

LeSueur operates a cheesemaking plant in LeSueur, Minnesota. Haskon is engaged in the sale and installation of dairy equipment. In October, 1969, LeSueur purchased a used pasteurizer and related equipment (referred to as an HTST in the industry) from Haskon for $5,000. The pasteurizer's function in cheesemaking is to heat milk sufficiently to meet health requirements. Haskon initially installed the HTST with a capacity of 20,000 pounds of milk per hour.

At the time of the original purchase, LeSueur's president, discussed with the Haskon representative, Edward Donohue, its plans for increasing its cheese production and the HTST's capabilities for expansion. Within ninety days of the purchase of the HTST, LeSueur proceeded

[2]The jury award of $605,250, less the twenty-five percent for contributory negligence, equals $453,937.50, less the $16,016.58 counterclaim equals $437,920.92.

to implement its plans to expand production. Haskon was hired to design a new cheese room and cheese facility to increase LeSueur's production capacity to 35.000 pounds of milk per hour. Haskon also installed the necessary equipment, piping and cheese vats. LeSueur paid Haskon an additional $167,687, exclusive of the vats, for the design, equipment, piping and installation of the cheese room and facility. During this time period, LeSueur's president talked with Donohue several times about expanding the capacity of the HTST to 35,000 pounds per hour. Donohue concedes that he represented that "Haskon could and would expand [the capacity of LeSueur's HTST] to 35,000 pounds per hour."

In January and February, 1971, LeSueur moved its operations into the new cheese room. At that time, Haskon restreamed[3] the HTST to increase its capacity to 26,000 pounds per hour and installed the unit in appellee's new cheese facility. As soon as the HTST was installed, the unit developed temperature control problems. The heat produced by the HTST was both fluctuating and excessive, and the temperature of the milk moving between the HTST and the cheese vat was either too high or too low. From Spring, 1971, to May, 1973, Haskon made several unsuccessful attempts to correct the temperature problems with the HTST. In May, 1973, LeSueur again called in Haskon to restream the HTST to increase its capacity to

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[3]The HTST is basically a frame which supports thin stainless plates and into which auxiliary equipment is incorporated. The pasteurizer's capacity is determined by the arrangement and number of plates and auxiliary equipment in the unit. Adjusting the arrangement and number of plates in the HTST to modify its capacity is referred to as "restreaming" in the cheese industry.

35,000 pounds of milk per hour. After this restreaming, the HTST continued to produce excessive heat. Haskon made several additional unsuccessful efforts to correct the temperature problems through June, 1974. In August, 1974, LeSueur brought in John McNamara, a pasteurizer dealer with over twenty years experience to examine the HTST. McNamara made four basic changes in the HTST which solved the temperature problems.

Thereafter, LeSueur commenced this action, contending that the temperature control problems resulted in a loss of cheese yield caused by the effect of excessive heat on the cheese-producing properties of milk.[4] LeSueur sought to recover the value of its lost production as measured by the difference between its projected yield[5] and its actual output during the time period when the HTST installed by Haskon was defective.

The jury found Haskon liable for breach of warranty, negligence and misrepresentation as a result of LeSueur's lost yield. The trial court denied Haskon's motions for a judgment notwithstanding the verdict or, alternatively, for a new trial, and entered judgment against Haskon. Haskon appeals from this judgment. While we have serious reservations as to whether the verdict can be sus-

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[4]*See* note 11 *infra* for a discussion of the adverse effect that excessive heat produced by the HTST has on cheese yield.

[5]The projected yield was determined by a mathematical equation, called the Van Slyke and Price formula, used in the cheese industry to estimate production. *See* Majority op. *infra* at 351 for a discussion of the application of the formula in this case.

tained on the implied warranty and misrepresentation counts,[6] it can be affirmed on the negligence theory.[7]

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[6]LeSueur contends that its purchase of the pasteurizer from Haskon created implied warranties of merchantability and fitness for a particular purpose as provided in Minn. Stat. §336.2-314 and Minn. Stat. §336.2-315, respectively. No express warranties were alleged. The jury found that the two implied warranties had been created by the transaction and had been breached by Haskon.

The documents of sale for the original purchase of the pasteurizer in 1969 and for the subsequent equipment purchases to expand production in 1971 and 1973 contained warranty disclaimer clauses. The trial court ruled, in effect, that Haskon's disclaimers were invalid as a matter of law. The trial judge's rationale was that if an oral service contract existed, the Uniform Commercial Code's (UCC) implied warranties could arise from such a service agreement, and that Haskon's disclaimers applied only to the sales contract and not to the services agreement.

The trial court was not clear as to whether it concluded that separate sale of goods and sale of service contracts were created, or whether a single contract, with services and goods aspects, existed. If it concluded that separate service and good contracts were entered into by LeSueur and Haskon, its implied warranty findings were erroneous. The implied warranty provisions of Minn. Stat. §§336.2-314, 336.2-315, like all provisions taken from Article 2 of the UCC apply only to the sale of goods, not the sale of services. *Wells v. 10-X Manufacturing Co.*, 609 F.2d 248, 254 (8th Cir. 1979); *Van Sistine v. Tollard*, 95 Wis.2d 678, 291 N.W.2d 636, 639 (1980). Therefore, if LeSueur's warranty claim is based on a separate oral service agreement between the parties, Minn. Stat. §§336.2-314, 336.2-315 are inapplicable and the appellee cannot claim that those statutory implied warranties were created by the transactions between Haskon and LeSueur. *Wells v. 10-X Manufacturing Co., supra*, 609 F.2d at 254; *Lewis v. Big Powderhorn Mountain Ski Corp.*, 69 Mich. App. 437, 245 N.W.2d 81, 82 (1976).

But, if the trial court concluded that a mixed goods and services contract existed, its implied warranty findings may not have been erroneous. The trial court's ruling was based on *O'Laughlin v. Minnesota Natural Gas Co.*, 253 N.W.2d 826, 830-831 (Minn. 1977); *Kopet v. Klein*, 275 Minn. 525, 530, 148 N.W.2d 385, 390 (1967), in which the Minnesota Supreme Court held that where installation or some similar service is related to the sale of goods, the implied warranties of the UCC cover the service as well as the goods. In *O'Laughlin* and *Kopet*, the Minnesota Supreme Court emphasized that implied warranties are favored under Minnesota law and did not discuss whether the sale of goods or installation was the most important aspect of the contracts. LeSueur argues that these cases suggest that Minnesota's implied warranty provision apply to all mixed sales of goods and services contracts.

II. *Negligence.*

Haskon challenges the jury's negligence finding on several grounds. First, it agrues that there is insuffi-

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This interpretation of the UCC would be contrary to the generally accepted rule that when a contract involves both the sale of goods and rendition of services, the test for whether the UCC's implied warranty and disclaimer provisions, UCC §§2-314 to 2-316, are applicable is whether the goods or services aspect predominates. *E. g., Bonebrake v. Cox,* 499 F.2d 951, 960 (8th Cir. 1974); *Air Heaters, Inc. v. Johnson Electric, Inc.,* 258 N.W.2d 649, 652 (N.D. 1977); Annot. 5 A.L.R.4th 501, 506 (1981). On one hand, if the predominant aspect of the contract is the rendition of services, the UCC implied warranty and disclaimer provisions do not apply to the transaction. On the other hand, if the predominant aspect of the contract is the sale of goods, the UCC implied warranty and disclaimer provisions apply to the transaction.

While the Minnesota Supreme Court apparently liberally construed the UCC implied warranty provisions in *O'Laughlin* and *Kopet,* it did not expressly reject the prevailing "predominant aspect" test for determining whether such mixed sales contracts create implied warranties. Because we hold that the jury's damage award can be sustained on LeSueur's negligence claim, we need not determine whether the district court correctly construed Minnesota's warranty statutes.

We reach the same conclusion on the appellee's misrepresentation cause of action. Under the out-of-pocket loss rule adopted by Minnesota for misrepresentation claims, a plaintiff can only recover what he has actually lost and not the expected profits from the transaction. *General Corp. v. General Motors Corp.,* 184 F.Supp. 231, 240 (D. Minn. 1960). Thus, Haskon argues that LeSueur is seeking to recover loss profits which cannot be recovered in a misrepresentation action. The Minnesota Supreme Court, however, has recognized exceptions to the out-of-pocket loss rule or a case-by-case basis. The court has permitted the plaintiffs to recover consequential economic damages when the recovery of out-of-pocket expenditures will not return the injured party to a status quo ante position. E.g., *Lewis v. Citizens Agency of Madelia, Inc.,* 306 Minn. 194, 200, 235 N.W.2d 831, 835 (1975); *Strouth v. Wilkison,* 302 Minn. 297, 300, 224 N.W.2d 511, 514 (1974).

We believe that LeSueur's claim is not solely for lost profits. *See* note 11 *infra* and accompanying text. But because of the nature of the damage to LeSueur's property from the excessive heat treatment, appellee's actual property damage cannot be precisely computed and separated from its claim for lost profits. Thus, LeSueur's measure of recovery for lost yield is in form a lost profits formula but, in effect, it is a claim for both lost profits and property damage. Under these circumstances, whether a Minnesota court would apply the general out-

cient evidence that Haskon committed any specific negligent acts or omissions, or that Haskon's conduct caused the appellee's loss. We do not agree. An appellate court cannot freely substitute its judgment for that of the jury. A jury's finding of negligence will be overturned for insufficient evidence—if at all—only where the verdict is clearly contrary to the evidence. *Urti v. Transport Commercial Corp.*, 479 F.2d 766, 769 (5th Cir. 1973); Wright & Miller, Federal Practice and Procedure: Civil § 2819 (1971). *See Minnesota Mutual Life Insurance Co. v. Wright*, 312 F.2d 655, 659-660 (8th Cir. 1963). The jury's decision was not manifestly incorrect in this case. While Haskon correctly observes that other factors—including inexperienced management, personnel turnover, and equipment and servicing obtained from companies

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of-pocket loss rule or the exception is an open question. Without discussing this issue, the trial court denied Haskon's request for a jury instruction stating that LeSueur could not recover lost profits in a misrepresentation action. Because LeSueur is entitled to recover on its negligence theory, we need not decide whether the jury's damage award can be sustained or a misrepresentation theory on the instant facts.

[7]We need only find that LeSueur is entitled to recover on one of its claims to sustain the verdict. *E. g., Zirinsky v. Sheehan*, 413 F.2d 481, 486 (8th Cir. 1969), *cert. denied*, 396 U.S. 1059, 90 S. Ct. 754, 24 L.Ed.2d 753 (1970). Haskon, citing *Arnott v. American Oil Co.*, 609 F.2d 873, 889 (8th Cir. 1979), *cert. denied*, 446 U.S. 918, 100 S.Ct. 1852, 64 L.Ed.2d 272 (1980), argues that a new trial must be ordered unless the damage award can be separately sustained under each of LeSueur's theories. This argument misperceives our disposition of the damages issue in *Arnott*. In that case, the jury found the defendant liable for misrepresentation, breach of fiduciary duty and violation of antitrust laws. *Id.* at 888. Because a single damages question was submitted to the jury for all three claims, this Court held that the $100,000 actual damage award could not be trebled because it would be speculative to assume the entire award was for the antitrust violations. *Id.* at 889. But the *Arnott* Court went on to state that since the evidence supported the actual damage award "on any of the three counts," it would not be set aside. *Id.* at 889. Thus, the *Arnott* Court did not find that to be award damages in a multiple claim case, a plaintiff must prove that he was entitled to recover on each of his causes of action.

other than the appellant—might have contributed to the reduction in yield, sufficient evidence was introduced for the jury to reasonably conclude that Haskon's negligent installation and servicing of the pasteurizer was the primary cause of LeSueur's loss.

Haskon designed, installed and twice restreamed the HTST. After the pasteurizer was restreamed, it developed temperature problems resulting in lost yield which Haskon could not correct despite repeated efforts and which ended only after John McNamara made four adjustments in August, 1974. Haskon's expert witness conceded that any of the four parts changed by McNamara could have caused the excessive heat problem in the pasteurizer. Finally, through its own expert, LeSueur introduced evidence that its actual cheese yield was further below its projected yield during the defective period than after the HTST was adjusted in August, 1974. From this evidence the jury could have rationally concluded that Haskon negligently caused LeSueur's loss of cheese yield.

Haskon also argues that the trial judge instructed the jury as to wrong standard of care. It contends that the trial court should have used the reasonable person charge rather than hold the appellant to a higher standard of care for professionals.[8] We disagree. Professional persons *and* those engaged in any work or trade requiring special skill must possess a minimum of special knowledge and ability as well as exercise reasonable care. *E g., City of Mounds View v. Walijarvi*, 263 N.W.

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[8]The trial court's instruction to the jury on the applicable standard of care owed by the appellant was:

> One who undertakes to render professional or technical services is under a duty to the person for whom the service is performed to exercise such care, skill and diligence of men in that profession or technical service ordinarily exercised under like circumstances.

2d 420, 424 (Minn. 1978); *City of Eveleth v. Ruble*, 302 Minn. 249, 253-255, 225 N.W.2d 521, 524-525 (1974); *Prosser, Law of Torts* § 32 at 161-162 (4th Ed. 1971). The evidence adduced at trial that installing and modifying the HTST required special skill and knowledge was sufficient to justify the trial court's instruction.[9]

Finally, Haskon contends that LeSueur's claim is solely for lost profits and that such economic losses are not recoverable in negligence in the absence of property damage or personal injury. The Minnesota Supreme Court has not yet specifically addressed the issue of whether economic loss unaccompanied by personal injury or property damage can be recovered in a negligence action. The court recently suggested in dicta that it may permit loss profits to be recovered in tort even in the absence of personal injury or property damage.[10] *Allied Aviation Fueling Company of Minnesota v. Dover Corp.*, 287 N.W.2d 657, 659 (Minn. 1980). But even if the Minnesota Supreme Court follows the majority position that purely economic losses are not recoverable in tort, Haskon's argument fails because the appellee's claim is

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[9]Haskon further argues that under Minnesota law, it cannot be subject to both a professional standard of care in a negligence action and a claim for breach of implied warranty. Because we hold that LeSueur cannot recover on its implied warranty claim, we need not address this argument.

[10]A number of states have held that purely economic loss can be recovered in tort. *Cova v. Harley Davidson Motor Co.*, 26 Mich. App. 602, 182 N.W.2d 800 (1970); *Lang v. General Motors Corp.*, 136 N.W.2d 805 (N.D. 1965); *Iacono v. Anderson Concrete Corp.*, 42 Ohio St.2d 88, 326 N.E.2d 267 (1975); *Berg v. General Motors Corp.*, 87 Wash.2d 584, 555 P.2d 818 (1976); *City of LaCrosse v. Schubert, Schroeder & Associates, Inc.*, 72 Wis.2d 38, 240 N.W.2d 124 (1976). The majority of courts to consider the issue, however, have held that claims for purely economic losses cannot be premised on tort theories. *E. g., Jones & Laughlin Steel Corp. v. Johns-Manville Sales Corp.*, 626 F.2d 280, 287 & n.13 (3d Cir. 1980); *J. M. Wilson & Co. v. Smith International, Inc.*, 587 F.2d 1363, 1376 (9th Cir. 1978).

not based solely on lost profits. LeSueur also suffered property damage to its milk. The excessive heat denatured the whey proteins in the milk and reduced the solubility of the ionic calcium in the milk and this damage decreased LeSueur's cheese yield.[11]

LeSueur argues that the property damage it has suffered can be measured by the difference between the volume of the cheese as produced by the defective HTST and the volume of the cheese that would have been produced if the pasteurizer was operating properly, with the difference being measured by market value. Although Haskon properly argues that this measure is in form a lost profits measure, on the instant facts, it is a satisfactory method of calculating property damage because of the special nature of the harm to LeSueur's milk. *See Monsanto Co. v. Thrasher,* 463 S.W.2d 25, 27 (Tex. 1970) (Property damage to plaintiff's corn crop caused by failure of defendant's herbicide to control weeds measured by "the difference between the value of the crop as produced with the weeds and the crop that would have been produced had the herbicide controlled as represented.").

Property damage, including damage to the defective property itself and to other property as a result of the defect, is recoverable in negligence. *Northern Pe-*

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[11]Milk has two groups of proteins: caseins and whey. The structure of cheese is made up of casein proteins. Excessive heat treatment of the milk in the HTST denatures the whey proteins. The result of this denaturization is that the whey combines with the caseins and interferes with the caseins' capacity to form into a strong curd structure. In addition, excessive heat treatment also makes the ionic calcium in the milk less soluble which also weakens the curd structure. The weaker the curd structure, the less cheese solids and more whey that is produced. The cheese solids move from the HTST to the cheese vats and eventually are turned into marketable cheese. Whey is the by-product of the process. Therefore, the ultimate result of excessively heating the milk in the HTST is lost cheese yield.

trochemical Co. v. Thorsen & Thorshov, Inc., 297 Minn. 118, 123-124, 211 N.W.2d 159, 165 (1973); Prosser, Law of Torts, § 101 at 665 (4th ed. 1971). Moreover, to the extent that some of LeSueur's claim is for lost profits in addition to property damage, a negligence action can be maintained for economic loss when personal injury or property damage are also present. *E. g., Duchene v. Wolstan*, 258 N.W.2d 601, 606 (Minn. 1977); *Northern Petrochemical Co. v. Thorsen & Thorsov, Inc., supra*, 297 Minn. at 123-124, 211 N.W.2d at 166.

Hence, each of Haskon's challenges to LeSueur's negligence action must be rejected and the judgment based on this theory is affirmed.

III. *Damages.*

Although damages must not be speculative or conjectural, the law does not require mathematical precision in proof of loss—proof to a reasonable certainty is sufficient. *E. g., Duchene v. Wolstan, supra.* We conclude that LeSueur has established its lost yield with sufficient certainty to sustain the jury's damage award on a theory of negligence. Because we are sustaining the jury's damage award only on the negligence theory, we need not reach Haskon's damages arguments regarding LeSueur's warranty and misrepresentation claims.

LeSueur relied on a mathematical formula, called the Van Slyke and Price formula, to calculate its lost yield. The Van Slyke formula projects the ideal cheese yield that can be produced from a certain quantity of milk at a given butter fat percentage with a given casein content. LeSueur computed its lost yield by comparing its actual yield with the Van Slyke projected output from May, 1971,

to August, 1974, the period when LeSueur was experiencing the temperature control defects with the pasteurizer. To determine the dollar value of its lost yield, LeSueur calculated the number of pounds of cheese that actual yield fell below the projected yield for each during the defective period and multiplied these monthly figures by the prevailing market price for the corresponding month.

Under the circumstances of this case, the Van Slyke formula was a reasonably accurate method of computing the appellee's damages. The Van Slyke formula is in general use in the cheese industry, by both academicians and producers. Moreover, we believe that LeSueur introduced evidence adequately demonstrating that its actual yield generally reached or was sufficiently close to its projected yield after the HTST was fixed to justify calculating damages during the defective period by comparing actual yield to projected yield.

During the defective period from May, 1971, to August, 1974, the weighted average of LeSueur's shortfall of actual yield below projected yield was approximately 2.90 percent per month.[12] After the excessive heat problem was eliminated by John McNamara in August, 1974, the weighted monthly average of LeSueur's shortfall for September, 1974, through December, 1977, was only .25 percent.

Haskon points out that for thirteen consecutive months following August, 1974, LeSueur failed to achieve its projected yield. LeSueur, however, performed better during

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[12]The weighted monthly average of LeSueur's shortfall during the periods from May, 1971, through August, 1974, and from September, 1974, through December, 1977, was calculated by dividing the sum of the monthly differences between projected and actual yield (measured in pounds produced) by the sum of the monthly projected yields.

the last four months of 1974 after the pasteurizer was fixed than it did for the first part of that year. Haskon is correct that during the first nine months of 1975, LeSueur's actual monthly yields sometimes were further below its projected yield than the monthly shortfalls during the defective period. But Professor Howard Morris of the University of Minnesota, along with LeSueur's president Mark Davis, testified that the Minnesota cheese industry in general failed to meet the Van Slyke projected yields in approximately the first half of 1975.[13]

Finally, from October, 1975, through December, 1977, LeSueur attained or exceeded its projected yield eighteen out of the twenty-seven months. During the defective period from May, 1971, to August, 1974, LeSueur attained or exceeded its projected yield only three months

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[13]Dr. Howard Morris, an expert in cheese production from the University of Minnesota, testified on cross-examination as follows:

Q. Do you have, based upon your knowledge of the cheese industry in Minnesota, any explanation of or account for the drop in yield in the spring of 1975?

[Morris] A. I know that Land O'Lakes and Mid-America Dairymen also experienced a drop in yield the first quarter of 1975. I have got records that show that. We don't actually know why or the number of causes that could come forth.

Q. There is no scientific explanation for the cause?

A. No, I don't know.

Q. I would like to have you assume, if you would, sir, that for the months of September 1974 and continuing through for a full year, including the month of September of 1975, and in each and every one of those 13 months that LeSeuer [sic] Creamery's actual yield at 37 percent moisture was below, and in some cases considerably below the calculated yield at 37 percent moisture, would you then be of an opinion as to whether or not the equipment at LeSeuer [sic] Creamery was operating properly at that time?

A. Yes, I would. I could explain.

Q. And what would your opinion be?

A. There are many reasons or causes for yields to vary. • • • One of the major ones in my opinion is heat damage, and it appeared to me that during this time, it's my opinion that during this time that the heat damage that was going on, that the causes of the yield differences were because of heat damage.

out of thirty. Moreover, the shortfall of actual output from projected yield during those nine months in 1975 to 1977 was significantly less than the shortfall for most of the months during the defective period.

This evidence is sufficient to demonstrate that LeSueur suffered reduced cheese yield. Once the fact of loss has been proven, the difficulty of proving the amount will not preclude recovery as long as there is a reasonable basis to approximate the amount. *Polaris Industries v. Plastics, Inc.*, 299 N.W.2d 414, 419 (Minn. 1980); *Leoni v. Bemis Co., Inc.*, 255 N.W.2d 824, 826 (Minn. 1977). LeSueur's evidence provides such a reasonable basis to calculate LeSueur's loss.

Haskon asserts that even if LeSueur has shown that it was damaged, the appellee has not established that the appellant has caused the loss. Haskon argues that under *Polaris Industries v. Plastics, Inc., supra,* 299 N.W.2d at 418—419, a plaintiff must segregate its lost yield due to the defective product from losses caused by other factors in order to recover from the seller of the defective goods. Haskon's reliance on *Polaris Industries* is misplaced. There, the Minnesota Supreme Court did not rule that a plaintiff must always segregate the sources of its damages in order to recover lost profits. Rather, it held that lost profits were not recoverable because "the circumstantial evidence * * * does not furnish a reasonable basis on which to determine plaintiff's loss." *Id.* at 419. In *Polaris Industries,* there was very little evidence that the defective gas tanks supplied by the defendant caused the plaintiff's reduced sales of snowmobiles. The plaintiff's most important evidence—data showing that it sustained losses during years the industry was generally

doing an increased volume of business—was excluded from trial for lack of foundation. And the defendant introduced evidence that a plethora of other factors could have caused the lost profits. Contrastingly, here LeSueur's evidence was sufficient to raise a reasonable inference that its lost profits were caused by Haskon. Under *B & Y Metal Painting, Inc. v. Ball*, 279 N.W.2d 813, 817 (Minn. 1979), once LeSueur raised a reasonable inference as to the amount of damages caused by the appellant, Haskon "is liable for such amount unless evidence is presented to rebut the inference and establish that the loss was caused by [other] factors." Haskon speculates at length about other factors that may have caused LeSueur's lost yield, but it did not introduce sufficient evidence for us to overturn the jury's verdict and hold that, as a matter of law, the appellant has rebutted the inference of causation or established that the damage was caused by other factors.

Haskon also argues that the jury's negligence verdict must be set aside because the trial court refused to admit into evidence LeSueur's income tax returns. The appellant contends that these tax returns show that LeSueur made a greater profit during the period when the pasteurizer was allegedly defective than it ever made before or after. Haskon argues, of course, that this evidence effectively would have rebutted LeSueur's claim that it suffered any loss from May, 1971, until August, 1974, as a result of the HTST's defective operation.

We agree that the appellee's tax returns for the time period when the pasteurizer was defective are relevant to the issue of whether LeSueur lost any profits. We cannot agree, however, that the failure to admit the re-

turns was such a clear abuse of discretion as to constitute reversible error. *See Control Data Corp. v. International Business Machines Corp.*, 421 F.2d 323, 326 (8th Cir. 1970).

The overriding issue in this case is not whether LeSueur made any profit during the years in controversy, but rather whether LeSueur would have made a larger profit but for the actions of Haskon. Hence, the probative value of the tax returns is not great. Furthermore, the appellee's tax returns showing that LeSueur made a profit when the pasteurizer was defective may well have misled or confused the jury and prejudiced LeSueur. Therefore, under Rule 403 of the Federal Rules of Evidence, the tax returns could be properly excluded.[14]

Finally, Haskon contends that the damages awarded for negligence must be limited to $5,000, the purchase price of the pasteurizer, because the purchase and shipping orders for the equipment contained the following limitation of liability provision:

> Liability of the seller, if any hereunder, shall in no event exceed in amount the purchase price of the materials sold with respect to any damages which are claimed.

In Minnesota, parties can by contract, without violating public policy, limit their liability for their own negligence. *E. g., Great Northern Oil Co. v. St.*

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[14]Rule 403 of the Federal Rules of Evidence provides:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Paul Fire and Marine Insurance Co., 291 Minn. 97, 100, 189 N.W.2d 404, 407 (1971); *Independent School District No. 877 v. Loberg Plumbing & Heating Co.*, 266 Minn. 426, 434, 123 N.W.2d 793, 798-799 (1963). The exculpatory provision need not expressly mention negligence; the only requirement is that it evince the parties' intention to limit liability for negligent conduct. *Great Northern Oil Co. v. St. Paul Fire and Marine Insurance Co., supra,* 291 Minn. at 100, 189 N.W.2d at 407; *Independent School District No. 877 v. Loberg Plumbing & Heating Co., supra,* 266 Minn. at 434, 123 N.W.2d at 799.

Here, the trial judge refused to give Haskon's requested instructions on the effect of the limitation of remedy provision in the sales documents.[15] The basis for his refusal was his decision, in effect, that as a matter of law, if an oral services contract existed between the parties, the limitation of remedy provision in the sales documents applied only to the pasteurizer and related equipment and not to the services agreement. Under these circumstances, the trial court should have submitted to the jury the question of whether the parties had agreed to an oral services contract. *Bergstedt, Wahlberg, Berquist Associates, Inc. v. Rothchild,* 302 Minn. 476, 479-480, 225 N.W.2d 261, 263 (1975). His failure to do so however, is not reversible error.

The trial judge utilized a special verdict form in which the following question was asked:

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[15]Shipping and purchase orders accompanied the original sale of the pasteurizer in 1969, and the sales of related equipment in January, 1970, and March, 1972, for the two subsequent expansions of the HTST. Each sales document contained the identical limitation of remedy provision.

> Did the defendant impliedly warrant the merchantibility [sic] of servicing the pasteurizing unit and related equipment?

Under the Uniform Commercial Code, an implied warranty of merchantability arises by operation of law when a purchaser and merchant enter into a contract unless the warranty is effectively disclaimed. *Moosbrugger v. McGraw-Edison Co.*, 284 Minn. 143, 157, 170 N.W.2d 72, 80 (1969); White & Summers, Uniform Commercial Code § 9-6 at 343-344 (2d Ed. 1980). Therefore, by finding that Haskon had impliedly warranted the merchantability of the servicing of the HTST, the jury, in effect, found that there was a service contract between Haskon and LeSueur.

The jury's determination that the parties entered into a services contract must be sustained. A jury finding will not be overturned for insufficient evidence unless it is clearly contrary to the evidence. *Urti v. Transport Commercial Corp., supra,* 479 F.2d at 769; Wright & Miller, Federal Practice and Procedure: Civil § 2819. *See Minnesota Mutual Life Insurance Co. v. Wright, supra,* 312 F.2d at 659-660. Haskon's argument that the jury's finding that a services agreement existed is not supported by the evidence fails to meet the strict standard for overturning a jury's factual determinations. The appellee introduced evidence that Haskon's sales representative told LeSueur's president that Haskon could, and would, expand the capacity of LeSueur's HTST to handle the appellee's proposed increase in production to 35,000 pounds of milk per hour. Additionally, Haskon designed appellant's new cheese room and facility, and in-

stalled the necessary equipment and piping. Moreover, in 1971 and 1973, Haskon in fact did restream LeSueur's pasteurizer to increase its capacity ultimately to 35,000 pounds of milk per hour. Finally, the appellant made numerous changes in the HTST between January, 1971, and June, 1974, in an effort to resolve the temperature problems with the pasteurizer. From this evidence, the jury could have rationally concluded that the parties entered into an oral contract pursuant to which Haskon would install and service LeSueur's HTST.

In addition, the appellant's objection that LeSueur's evidence of an oral service agreement violated the parol evidence rule is waived and cannot be asserted because it is raised for the first time on this appeal. *Sartin v. Commissioner of Public Safety of State of Minnesota*, 535 F.2d 430, 433 (8th Cir. 1976).

Finally, the trial court's refusal to give Haskon's requested instruction regarding the limitation of remedy provision does not constitute reversible error. Haskon introduced no evidence that the parties intended to limit the appellant's liability for negligently servicing the pasteurizer other than the sales documents for the pasteurizer and related equipment containing the limitation of remedy clause. On that evidence, it was not clearly erroneous to conclude, as a matter of law, that if an oral service agreement existed, the parties did not intend to limit Haskon's liability for negligent service.

Since the parties did not evince an intent to limit Haskon's liability, LeSueur's recovery is not limited to the purchase price of the pasteurizer. *Great Northern Oil Co. v. St. Paul Fire and Marine Insurance Co., supra,*

291 Minn. at 100, 189 N.W.2d at 407; *Independent School District No. 877 v. Loberg Plumbing & Heating Co., supra,* 266 Minn. at 434, 123 N.W.2d at 799.

IV. *Contributory Negligence.*

The Minnesota comparative fault statute governing in this case requires that in actions involving negligence "any damages allowed shall be diminished in proportion to the amount of negligence attributable to the person recovering." Minn. Stat. §604.01 (1969).[16] Here, the jury found that LeSueur's own negligence caused twenty-five percent of its loss. Nevertheless, the trial court entered judgment in favor of LeSueur for the entire $605,250 jury award without a reduction for the appellee's own negligence.

The trial judge refused to reduce the damage award because he concluded that "the jury has already reduced the verdict to reflect the plaintiff's negligence or failure to mitigate. A further reduction is neither proper nor required by the comparative fault statute. The trial judge reached this conclusion because $807,000, the amount of loss claimed by LeSueur, reduced by twenty-five percent, equals the jury award of $605,250.

The trial court's refusal to reduce the damages awarded in proportion to LeSueur's own negligence was erroneous. Minnesota law explicitly requires that a jury's damage award be proportionally reduced by the amount of negligence attributable to the prevailing party. It was pure speculation by the trial judge to con-

[16]The 1969 version of the statute was amended in 1978 to cover actions in addition to negligence, and contributory "fault" was substituted for "negligence" as the basis for reducing damage awards. Minn. Stat. §§604.01, 604.01, 1a (1978).

clude that the jury had already reduced its verdict to reflect LeSueur's negligence. The jury may just as well have found that the appellee had only proven $605,250 in losses. The trial judge is not free to speculate as to the reasons for the jury's verdict, *see Arnott v. American Oil Co.*, 609 F.2d 873, 889 (8th Cir. 1979); he must apply the statute and reduce the damages awarded in proportion to the prevailing party's own fault. *See Woods, The Negligence Case: Comparative Fault* (1978) § 20:3 at 384-385. Neither the trial court or LeSueur offer any support for any other construction of Minnesota's comparative fault statute. Therefore, the jury's $605,250 damage must be reduced by twenty-five percent—to $453,937.50—to reflect the amount of LeSueur's loss attributable to its own negligence, less the $16,016.58 counterclaim.

The judgment, as modified, is affirmed.

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* * *

SUPERWOOD CORPORATION,

Plaintiff.

vs.

SIEMPELKAMP CORPORATION and G. Siempelkamp & Company,

Defendants.

No. 51867.

Supreme Court of Minnesota.

Oct. 2, 1981.

Yetka, J., concurred in part and dissented in part and filed opinion.

Heard, considered and decided by the court en banc.

SCOTT, Justice.

This is a products liability case involving three questions certified to this court by the Federal District Court of Minnesota. The certified questions arise from a case involving the purchase by plaintiff, Superwood Corporation, of a hot plate press manufactured in 1954 by defendant, G. Siempelkamp. The press operated without problem from 1954 to 1975, when the cylinder on the hot plate press failed and could not be repaired. On March 12, 1979, three years after the cylinder failed, plaintiff brought this Federal District Court action based on negligence, strict products liability, breach of warranty, and breach of contract. Plaintiff sought $616,716 in damages because of alleged damage to the press and lost profits.

The federal court granted defendant's summary judgment motion on the contract and warranty claims.[1] With regard to the strict liability and negligence claims, the federal court certified three questions of "uncertain" state law to this court:

CERTIFIED QUESTIONS

1. Is the manufacturer of defective equipment (a press) strictly[2] liable in negligence to the user of

[1]The federal court dismissed the contract and warranty claims, finding that the statute of limitations had run on those claims.

[2]It is our assumption that the word "strictly," as used in the certified question by the federal court, was unintended, because strict liability and negligence are separate theories of recovery. The similarity of the first and second questions indicates that use of "strictly" in Question 1 was a clerical error.

the equipment damaged in its property and business by negligent product manufacture, inspection, or installation supervision?

2. Is the manufacturer of defective equipment (a press) strictly liable in tort to the user of the equipment damaged in its property and business by the product defect?

3. If question 1 or 2, or both, are answered affirmatively, are any or all of the following items of damages recoverable, if directly caused by negligence or defect?

   a. Costs of replacement and transportation of a substantial component part of the product.

   b. Clean-up labor, including payroll taxes and employee fringe benefits.

   c. Repair, replacement, and other factory labor, including payroll taxes and employee fringe benefits.

   d. Costs of inspection of the destroyed part and the replacement thereof.

   e. Net sales value of production lost, less non-continuing expenses.

   f. Increased costs of production from other facilities of plaintiff to supply goods to its Bemidji Nu-Ply plant customers to keep their goodwill.

To answer these questions we must determine whether economic losses arising out of commercial transactions are recoverable under negligence and strict products li-

ability theories.[3] Defendant argues that when the Minnesota Legislature enacted the Uniform Commercial Code[4] (U.C.C.) it created a comprehensive statutory scheme for dealing with the rights and duties of parties to commercial sales transactions. Defendant contends that to allow a tort action would circumvent the system of rights and remedies detailed by the legislature in the U.C.C.

Many courts have considered defendant's argument, the first of which was the New Jersey Supreme Court in *Santor v. Karagheusian*, 44 N.J. 52, 207 A.2d 305 (1965). In *Santor*, a commercial plaintiff purchased defective carpeting from a retailer. The New Jersey court held that the plaintiff could proceed against the manufacturer under either strict products liability or the U.C.C.'s warranty provisions. In so holding, the *Santor* court decided that the U.C.C. did not provide the exclusive set of remedies for cases arising out of commercial transactions.[5]

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[3]The basic theory behind strict products liability is embodied in the Restatement (Second) of Torts 402A (1965) as follows:

> One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property, is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property * * *.

Strict products liability was adopted by this court in *McCormack v. Hankscraft Co.*, 278 Minn. 322, 154 N.W.2d 488 (1967).

[4]The U.C.C. was enacted in this state on May 26, 1965. *See* Act of May 26, 1965, ch. 811, 1965 Minn. Laws 1290.

[5]The *Santor* court may have "stretched" to allow tort remedies in order to avoid privity requirements that would otherwise have prevented any action against remote sellers of defective products. *See* Steenson, *The Anatomy of Products Liability in Minnesota: The Theories of Recovery*, 6 Wm. Mitchell L.Rev. 1, 50 n. 207 (1980). This reason for allowing tort recovery does not exist in Minnesota, since the Minnesota Legislature has adopted the most liberal privity alternative of the U.C.C., *see* Minn. Stat. §336.2-318 (1980), and because this court has consistently avoided privity limitations, *see Durfee v. Rod Baxter Imports, Inc.*, 262 N.W.2d 349, 358 (Minn. 1978), *noted in* 5 Wm. Mitchell L. Rev. 241 (1979); *Milbank Mutual Ins. Co. v. Proksch*, 309 Minn. 106, 113, 244 N.W.2d 105, 109 (1976); *McCormack v. Hankscraft Co.*, 278 Minn. 322, 339, 154 N.W.2d 488, 500-01 (1967); *Beck v. Spindler*, 256 Minn. 543, 562, 99 N.W.2d 670, 683 (1959); *Schubert v. J. R. Clark Co.*, 49 Minn. 331, 340, 51 N.W. 1103, 1106 (1892).

Soon thereafter, the California Supreme Court considered the same issue in *Seely v. White Motor Company*, 63 Cal.2d 9, 45 Cal. Rptr. 17, 403 P.2d 145 (1965). The *Seely* court considered whether a plaintiff could, based on a strict products liability theory, recover the purchase price of a defective truck and the resulting loss of profits for lack of its normal use. In rejecting the *Santor* holding, Chief Justice Traynor, writing for the California court, recognized that the law of sales was designed to meet the needs of commercial transactions. The court refused to allow a form of recovery that would determine the law of sales, and not reflect the understanding of the parties. *Id.* at 15, 45 Cal.Rptr. at 23-24, 403 P.2d at 151. The California court held that economic losses were not recoverable in an action based on strict products liability. In *dicta* the court also indicated that, even in actions based on negligence, economic losses were not actionable. *Id.* at 16, 45 Cal.Rptr. at 24, 403 P.2d at 151. The majority of jurisdictions that have considered this issue have followed the holding in *Seely*.[6]

Although this is a case of first impression in Minnesota, this court has already demonstrated its approval of *Seely* in *Farr v. Armstrong Rubber*, 288 Minn. 83, 179 N.W.2d 64 (1970). In *Farr*, this court stated:

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[6]A number of jurisdictions have adopted the *Seely* position: *Iowa Elec. Light & Power Co. v. Allis-Chalmers Mfg. Co.*, 360 F.Supp. 25, 27-33 (S.D. Iowa 1973); *Miehle Co. v. Smith-Brooks Printing Co.*, 303 F.Supp. 501, 503 (D. Colo. 1969); *Morrow v. New Moon Homes, Inc.*, 548 P.2d 279 (Alaska 1978); *Beauchamp v. Wilson*, 21 Ariz. App. 14, 515 P.2d 41 (1973); *Long v. Jim Letts Oldsmobile, Inc.*, 135 Ga. App. 293, 217 S.E.2d 602 (1975); *Clark v. International Harvester Co.*, 99 Idaho 326, 581 P.2d 784 (1978); *Rhodes Pharmacal Co. v. Continental Can Co.*, 72 Ill. App. 2d 362, 219 N.E.2d 726 (1966); *Marcil v. John Deere Industrial Equipment Co.*, — Mass. —, 403 N.E.2d 430 (Mass. App. 1980); *Hawkins Constr. Co. v. Matthews Co., Inc.*, 190 Neb. 546, 209 N.W.2d 643 (1973); *Ford Motor Co. v. Lonon*, 217 Tenn. 400, 398 S.W.2d 240 (Tenn. 1966).

> Applying § 402A's concept of strict liability in tort will not result in absolute liability of the manufacturer, as Armstrong contends; *nor will it supersede the Uniform Commercial Code concept of strict liability in implied warranty, as some commentators fear.*
>
> * * * *
>
> *The laws of warranty still meet the needs of commercial transactions and function well in a commercial setting.* See, *Seely v. White Motor Co.*, 63 Cal. 2d 9, 45 Cal.Rptr. 17, 403 P.2d 145. However, the Restatement theory of responsibility more adequately meets the public policy need to protect consumers from the inevitable risks of bodily harm created by mass production and complex marketing conditions. *McCormack v. Hankscraft Co., Inc., supra.*

Id. at 93-94, 179 N.W.2d at 70-71 (emphasis added).

The U.C.C. clarifies the rights and remedies of parties to commercial transactions. For example, there are specific provisions covering warranties, *see* Minn. Stat. § 336.2-314 (1980); warranty disclaimers, *see* Minn. Stat. § 336.2-316 (1980); liability limitations, *see* Minn. Stat. § 336.2-719 (1980); and notice provisions, *see* Minn. Stat. § 336.2-607 (1980). The recognition of tort actions in the instant case would create a theory of redress not envisioned by the legislature when it enacted the U.C.C. Furthermore, tort theories of recovery would be totally unrestrained by legislative liability limitations, warranty disclaimers and notice provisions. To allow tort liability in commercial transactions would totally emasculate these provisions of the U.C.C. Clearly, the legislature did not intend for tort law to circumvent the statutory scheme of the U.C.C.

In *Cline v. Prowler Industries of Maryland, Inc.*, 418 A.2d 968 (Del. 1980), the Supreme Court of Delaware held that, regarding sales transactions, the U.C.C. completely preempted the field of products liability. According to the Delaware court even an injured consumer purchaser would have to look to the U.C.C. for the sole source of remedies. We, however, do not agree that the U.C.C. was intended to preempt the entire area of products liability. Strict products liability developed in large part to fill gaps in the law of sales with respect to consumer purchasers. *See* Noel, *Products Liability of Retailers and Manufacturers in Tennessee*, 32 Tenn.L.Rev. 207 (1965); *Prosser, The Assault Upon the Citadel* (Strict Liability to the Consumer), 69 Yale L.J. 1099, 1124-34 (1960); Traynor, *The Ways and Means of Defective Products and Strict Liability*, 32 Tenn.L.Rev. 363 (1965). Limiting the application of strict products liability to consumers' actions or actions involving personal injury will allow the U.C.C. to satisfy the needs of the commercial sector and still protect the legitimate expectations of consumers.

For these reasons, we hold that economic losses that arise out of commercial transactions, except those involving personal injury or damage to other property, are not recoverable under the tort theories of negligence or strict products liability. We therefore answer certified questions 1 and 2 in the negative. Because of our resolution of the first two questions, we need not discuss the third certified question.

YETKA, Justice (concurring in part and dissenting in part).

I concur in that portion of the majority opinion that concludes that strict liability in tort cannot be asserted by a commercial plaintiff as a ground for recovery of purely economic injury.

I must dissent, however, to that portion of the majority opinion that concludes that the negligence of a manufacturer cannot be asserted by a commercial plaintiff as a ground for recovery of economic injury.

Actions based on negligence have long been recognized in commercial contexts in this state. *See Nieman v. Channellene Oil & Mfg. Co.*, 112 Minn. 11, 127 N.W. 394 (1910) (retailer recovered damages from the wholesaler for loss of business resulting from the sale of contaminated cooking oil); *Ellis v. Lindmark*, 177 Minn. 390, 225 N.W. 395 (1929) (recovery allowed for economic damages to plaintiffs' poultry business resulting from, *inter alia*, wholesaler's mislabeling of raw linseed oil as cod liver oil). The majority is, therefore, abrogating rights long recognized to exist in commercial plaintiffs.

There is no indication that the legislature intended to preempt negligence recovery when it enacted the Uniform Commercial Code (UCC). There are no references in the text or the comments of the UCC from which such preemption can be inferred. Moreover, Minn. Stat. § 336.-1-102(3) (1980) provides that the general obligations of the UCC, such as "reasonableness" and "care," may not be disclaimed by agreement. This strongly suggests that the legislature had no interest in protecting negligent commercial parties.

Legislative enactments are not to be construed in derogation of well-established principles of common law unless the express language or the necessary implications

of the particular statute require such construction. *Fuller v. City of Mankato*, 248 Minn. 342, 347, 80 N.W.2d 9, 12 (1956); *Swogger v. Taylor*, 243 Minn. 458, 465, 68 N.W.2d 376, 382 (1955). Because there is no clear indication of preemption in this case, I believe the action for negligently inflicted economic loss in commercial contexts survives the enactment of the UCC.

Further, there is no basis for the contention that negligence recovery for economic loss would "emasculate" the remedies provided through the UCC. *Cf. Santor v. A. & M. Karagheusian, Inc.*, 44 N.J. 52, 207 A.2d 305 (1965) (allowing implied warranty recovery).[1] The remedies provided by the UCC merely supplement the negligence theory of recovery. UCC 2-318, Comment 2, indicates that the expansion of existing warranties to the buyer's household and guests should be "accomplish[ed] * * * without any derogation of any right or remedy resting on negligence." This is a significant indication that the UCC is not designed to exclude negligence from its scheme of remedies.

The continued recognition of negligence recovery for economic loss will not diminish the use or effectiveness of the Code remedies but merely provide an additional means of compelling production of quality manufactured goods. The majority's decision effectively restricts the ability of commercial purchasers to require the manufacturers to provide products that will not result in damage

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[1]In addition, see *Cova. v. Harley Davidson Motor Co.*, 26 Mich. App. 602, 609-11, 182 N.W.2d 800, 806-10 (1970); *Russell v. Ford Motor Co.*, 281 Or. 587, 588-93, 575 P.2d 1383, 1384-86 (1978); *Nobility Homes of Texas, Inc. v. Shivers*, 557 S.W.2d 77, 80-83 (Tex. 1977); *Berg v. General Motors Corp.*, 87 Wash.2d 584, 587-94, 555 P.2d 818, 819-23 (1976); *City of LaCrosse v. Schubert, Schroeder & Assocs.*, 72 Wis.2d 38, 43-45, 240 N.W.2d 124, 127-28 (1976).

to property. The duty to which manufacturers can be held under negligence standards is not so onerous that this court must step in to relieve them of that duty.

Finally, under the majority opinion, distribution of defective products is only subject to a negligence action when the defect results in personal injury or damages to other property. It seems to me imprudent to permit manufacturers to sell negligently produced and potentially dangerous products and only to make them accountable when a person is harmed or other property is damaged. The better approach is to require accountability when any injury, economic or otherwise, occurs. Insistence on such accountability will provide a definite incentive to manufacture only quality products that ensure the safety of all consumers.

SHERAN, C. J., took no part in the consideration or decision of this case.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

LeSueur Creamery, Incorporated, a Minnesota corporation,

Appellee,

vs.

Haskon, Inc., a Delaware corporation; Hercules Incorporated, a Delaware corporation,

Appellants.

Appeal from the United States District Court for the District of Minnesota.

No. 80-2003

September Term, 1981

The Court, having considered appellants' petition for rehearing and suggestions for rehearing en banc and being now fully advised in the premises, hereby orders the petition for rehearing and suggestions for rehearing en banc denied.

October 26, 1981

Opposition

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No. 81-1383

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

HASKON, INC., a Delaware corporation, and HERCULES INCORPORATED, a Delaware corporation,
Petitioners,

vs.

LeSUEUR CREAMERY, INCORPORATED, a Minnesota corporation,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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IN THE

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HASKON, INC., a Delaware corporation, and HERCULES INCORPORATED, a Delaware corporation,
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vs.

LeSUEUR CREAMERY, INCORPORATED, a Minnesota corporation,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

STATEMENT OF THE CASE

Respondent (LeSueur) commenced an action against Petitioners (Haskon) for damages alleging breach of warranty, misrepresentation and negligence. The jury found in favor of LeSueur on all three causes of action. The District Court affirmed the findings of the jury and denied Haskon's motion for judgment notwithstanding the verdict or in the alternative for a new trial or amended judgment, and entered judgment in favor of LeSueur. The United States Court of Appeals for the Eighth Circuit

affirmed the judgment, as modified, on the negligence cause of action. The Court of Appeals did not decide, on the merits, whether the damage award could be sustained on the warranty or the misrepresentation causes of action, holding that it need not determine those issues because it was affirming the award on the negligence theory. (Petitioners' Brief, footnote 6 on A. 10 and 11).

Haskon sold, installed, modified and serviced a high-temperature, short-term pasteurizer (called an HTST) for LeSueur. Haskon initially, in 1968, modified and designed the HTST to process 20,000 pounds of milk per hour. In 1971 it redesigned the HTST and added other auxiliary equipment to increase its capacity to 35,000 pounds. This was done in conjunction with a new cheese room and related equipment Haskon sold and designed for LeSueur at a cost of $167,687.00. The HTST did not operate correctly at 35,000 capacity, although Haskon made extensive and numerous changes in an effort to correct it. The problem was corrected in one day by a third party.

In cheese manufacturing, the function of the HTST is to bring the milk up to a temperature of 161° and then cool the milk down so it exits the unit into the cheese vats at 88°. It is the most critical and important piece of equipment in the cheese-making process. Due to its malfunctioning, it was common for the temperature in the unit to go as high as 200°. (T. 263—Temperature charts introduced as an exhibit.) The excessive heat applied to the milk damaged the milk by denaturing the whey proteins in the milk and reducing the solubility of the ionic calcium in the milk. This reduced the yield of cheese because it caused more of the milk solids which make up the cheese to go off into whey. Whey is the waste by-prod-

uct of transforming milk into cheese. Part of the loss of yield was also due to milk solids burning onto the plates of the HTST due to excessive heat and to milk going down the sewer drain when the HTST diverted the milk because it was not functioning. (T. 39, 42, 263.) The damages sustained by LeSueur were for its lost yield of cheese caused by the damage to its milk.

ISSUES

I.

The Decision of the Court of Appeals Does Not Conflict with Minnesota Case Law Since it Applied the General Rule Set Down in the *Superwood* Case.

In *Superwood v. Siempelkamp*, 311 N.W.2d 159 (Minn. 1981), the Minnesota Supreme Court established the remedies for losses arising out of commercial transactions in the following specific language:

> "For these reasons, we hold that economic losses that arise out of commercial transactions, *except those involving personal injury or damage to other property*, are not recoverable under the tort theories of negligence or strict products liability." [Emphasis supplied.]

Haskon's entire contention is based upon the argument that LeSueur did not suffer any damage to its property, and its loss was solely an economic loss. Such assertion is not based upon any evidence in the case, but is based solely upon argument. Judge Heaney succinctly summarized the evidence which proved that excessive heat treatment damages the milk in Footnote 11 of his opin-

ion. (Petitioners' Brief A. 15.) This summary was based upon the testimony of Mr. Krueger, National Production Manager for Kraft Foods; Mr. Kinnate, National Procurement Manager for Kraft Foods; and Dr. Howard Morris, Professor of Food Science at the University of Minnesota. (Krueger D. 107-110, Kinnate D. 107, and T. 353, 355, 359, 443.)[1] Dr. Morris taught and did extensive research on cheese manufacturing since 1952. Haskon offered *no* evidence or witnesses to contradict this testimony or to support its argument that there was no damage to the milk. It is true that the bulk of the damage was to the properties of the milk, changing its composition; however, there was specific damage to the milk also. The evidence clearly established that the malfunctioning of the HTST caused the flow of the milk to divert onto the floor and then to the sewer drain. Also there was specific evidence that the excessive heat in the HTST caused milk to burn onto the plates, much like an egg burns in a frying pan which is too hot. Although the nature of the damage to its property (damaging the properties of the milk) required LeSueur to establish the amount of the damage in terms of lost yield of cheese, the fact remains that damage to its milk is property damage within the language and meaning of the *Superwood* decision. Haskon sold an HTST and related parts and equipment to LeSueur and provided service in its installation. It obviously did not sell milk, so damage to LeSueur's milk is damage to "other property" as required in the *Superwood* decision. LeSueur is not aware of any law, as contended by Haskon, requiring its property to be rendered completely unfit or

[1]Citations designated at "D" are page numbers from depositions introduced into evidence, and "T" are page numbers from the trial transcript.

unusable before it can be considered property damage within the definition of the *Superwood* case. Such a rule would lead to ridiculous results.[1]

II.

The Court of Appeals Decision Does Not Raise Any Significant Problem in the Uniformity and Predictability of Commercial Law Under the Uniform Commercial Code.

The decision of the Court of Appeals, based upon Minnesota law, is very specific and unequivocal. It stands for the proposition that a party *is* entitled to recover for negligence in a commercial transaction when there is personal injury or property damage. There was no evidence of molecular damage. There was extensive evidence of property damage to the milk of LeSueur.

Haskon's comparison of the alleged damage to the hydraulic fluid in the hot plate press in the *Superwood* decision (which is not referred to in the opinion) with the damages to LeSueur's milk, is frivolous. LeSueur, during the time of damages, was processing ten million pounds of milk a month. (T. 749.) Each pound of milk was damaged by excessive heat, denaturing the whey proteins and making the ionic calcium in the milk less soluble. (T. 354, 355.)[2] This evidence on property damage was clear, concise and unequivocal.

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[1]For example, no recovery for damage to a growing crop that substantially reduces the yield unless it is totally destroyed, or no recovery for damage to any commodity unless destroyed or rendered unfit.

[2]Denature is defined in *Funk and Wagnall's Standard Dictionary of the English Language* as "to adulterate for the purpose of changing certain qualities; make a change in the nature of."

What constitutes property damage will continue to be a point of possible controversy regardless of the outcome of this proceeding. The only way to prevent complexity and uncertainty for damages in commercial transactions is to prohibit recovery for property damage. But that is not the Minnesota law as set forth in *Superwood*.

III.

The Finding of the Court of Appeals That LeSueur Sustained Property Damage Was in Accord With the Findings of the Jury and the Evidence, and Did Not Infringe Upon Petitioners' Right of Jury Trial.

LeSueur, at trial, had numerous witnesses who testified as to malfunctioning of the HTST causing excessive heat treatment to its milk. The entire thrust of nearly all of its evidence was to establish damage to its milk. The only other evidence was to establish the effect or damage caused to milk by excessive heat and the loss of yield of cheese due to the damage to the milk. LeSueur never contended that Haskon directly damaged its cheese. The jury, by answering "yes" in Questions 6, 13 and 16 of the Special Interrogatory Verdict Form, found that Haskon's breach of warranties, misrepresentation and negligence was a direct cause of damage to LeSueur. (A. 1.) By finding direct damage they obviously found there was damage to the milk of LeSueur, because the evidence clearly established it was the only property damaged.

Haskon's reliance on *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464 (1962), is misplaced and not in point with this case. *Poller* involved a case where the

Appellate Court reversed summary judgment granted by the Trial Court in a restraint of trade action. The Trial Court based its summary judgment action upon depositions and affidavits. In contrast, this was a case fully tried with each party having the right to introduce whatever evidence they had that was relevant, and the Court of Appeals had the opportunity to read the entire record.

Assuming arguendo that the jury did not in its verdict form find as a fact there was property damage, a more appropriate standard to apply than summary judgment, would be whether the Trial Court could have directed a verdict on that issue at the conclusion of the evidence. This Court in *Gunning v. Cooley*, 50 S.Ct. 231 (1929), confirmed in *Pennsylvania Railroad Co. v. Chamberlain*, 288 U.S. 333, 343, 53 S.Ct. 391, 77 L.Ed. 819, established the rule on directed verdict as follows:

> "Where the evidence upon any issue is all on one side or so overwhelmingly on one side as to leave no room to doubt what the fact is, the court should give a peremptory instruction to the jury."

The Court in *Gunning* also said that a mere scintilla of evidence is not enough to require the submission of an issue to the jury. In this case Haskon didn't even offer a scintilla of proof to controvert the evidence of LeSueur that there was property damage to its milk. Therefore, the record clearly establishes that LeSueur would have been entitled to a directed verdict on the property damage issue, not requiring a jury determination. Thus, there could be no deprivation of a right to a jury trial.

IV.

Was This Appeal Taken by Petitioners Merely to Delay Proceedings on the Judgment?

Pursuant to Section 1961 of Title 28, USCA, and applicable Minnesota law, interest on LeSueur's judgment accrues at the rate of eight (8%) per cent per annum. This is much less than the prevailing commercial rate of interest, and is strong incentive to Haskon to delay proceedings.

The issue of whether LeSueur could recover on negligence in a commercial transaction under the facts of this case was specifically addressed by Judge Heaney in his learned opinion in the following direct and unequivocal language:

> "But even if the Minnesota Supreme Court follows the majority position that purely economic losses are not recoverable in tort. Haskon's argument fails because the appellee's claim is not based solely on lost profits. LeSueur also suffered property damage to its milk. The excessive heat denatured the whey proteins in the milk and reduced the solubility of the ionic calcium in the milk and this damage decreased LeSueur's cheese yield." [Petitioners' Brief A. 14-15.]

The Court of Appeals was furnished a copy of the *Superwood* decision with Haskon's petition for rehearing. Rehearing was denied. It was obviously denied because Judge Heaney had anticipated the *Superwood* decision and addressed the issue if Minnesota followed the majority rule requiring property damage in tort actions. Yet Haskon filed this appeal raising as its main issue the very

issue directly addressed by the Court of Appeals and so overwhelmingly established by the evidence. The other issues raised on appeal are all related to the issue of property damage. We submit this strongly suggests the appeal was taken for delay purposes. With the tremendous case load placed upon this Court, the Bar should be given a clear signal that appeals for purposes of delay will not be tolerated.

Rule 56(2) of the *Supreme Court Rules* reads as follows:

> "In all cases where an appeal delays proceedings on the judgment of the lower court, and appears to have been sued out merely for delay, damages at a rate not exceeding 10 per cent, in addition to interest, may be awarded upon the amount of the judgment."

We request the Court to invoke the rule and award damages to LeSueur as provided in the rule.

CONCLUSION

The Court should not grant a Writ of Certiorari.

Respectfully submitted,

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LeSueur Creamery, Incorporated

Dated: February 8, 1982.

Appendix

APPENDIX

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
SECOND DIVISION

LeSUEUR CREAMERY, INCORPORATED, a Minnesota corporation,

Plaintiff,

vs.

HASKON, INC., a Delaware corporation; HERCULES, INCORPORATED, a Delaware corporation,

Defendants.

Special Verdict

Civil 2-75-123

Misrepresentation

1. Did the defendant, Haskon, Inc., by any of its employees or agents, represent to plaintiff that they were capable of modifying and installing the pasteurizing unit and related equipment?

X Yes —— No

(If your answer to Question 1 is yes, answer the following question:)

2. Was said representation false:

X Yes —— No

(If your answer to Question 2 is yes, answer the following question:)

3. Was said representation made with intent to induce plaintiff to act?

X Yes —— No

4. Did the plaintiff rely on the misrepresentation?

X Yes —— No

(If your answer to Question 4 is yes, answer the following question:)

5. Was plaintiff's reliance justifiable?

X Yes —— No

(If your answer to Question 5 is yes, answer the following question:)

6. Did the plaintiff suffer damage as a result of its reliance on the representation?

X Yes —— No

Implied Warranty of Merchantability

7. Did the defendant impliedly warrant the merchantability of servicing the pasteurizing unit and related equipment?

X Yes —— No

(If your answer to Question 7 is yes, answer the following question:)

8. Did the defendant breach said implied warranty of merchantability?

X Yes —— No

(If your answer to Question 8 is yes, answer the following question:)

9. Was said breach a direct cause of damage to plaintiff?

X Yes —— No

Implied Warranty for a Particular Purpose

10. Did defendant know the particular purpose for which the pasteurizing equipment service was to be used?

X Yes —— No

(If your answer to Question 10 is yes, answer the following question:)

11. Did the defendant impliedly warrant the fitness of said equipment for that particular purpose?

X Yes —— No

(If your answer to Question 11 is yes, answer the following question:)

12. Did the defendant breach its implied warranty of fitness for a particular purpose?

X Yes ——No

(If your answer to Question 12 is yes, answer the following question:)

13. Was said breach a direct cause of damage to plaintiff?

X Yes —— No

Negligence

14. Did the pasteurizing unit and related equipment sold and serviced by defendant to and for plaintiff fail to operate properly between May, 1971, and September, 1974?

X Yes —— No

(If your answer to Question 14 is yes, answer the following question:)

15. Was the defendant negligent in servicing said pasteurizing unit and related equipment?

X Yes —— No

(If your answer to Question 15 is yes, answer the following question:)

16. Was said negligence a direct cause of damage to plaintiff?

X Yes —— No

(If your answer to Question 14 is yes, answer the following question:)

17. Was the plaintiff negligent in maintaining and servicing said pasteurizing unit and related equipment?

X Yes —— No

(If your answer to Question 17 is yes, answer the following question:)

18. Was said negligence a direct cause of damage to plaintiff?

X Yes —— No

(If your answers to Questions 16 and 18 are yes, answer the following question:)

19. Taking the negligence that combined to directly cause plaintiff's damage, if any, as 100%, what percentage or proportion of negligence is attributable to:

Plaintiff	25%
Defendant	75%
Total	100%

Damages

20. What sum of money will fairly compensate plaintiff for damage, if any, it suffered?

$ 605,250.00

Dated: July 30, 1980.

/s/ NED PETERSON
Foreperson